SIMON LESSER,
Plaintiff in Error

v.

JAMES R. GRAY,
Defendant in Error

Supreme Court of the United States
October Term, 1914
No. 110

The cases cited by plaintiff in error do not reach the points made in the motion to dismiss.

Palmer vs. Hussey, 119 U. S., 96, rules simply that where plaintiff sues asserting that his debt is saved by an express section of the Bankrupt Act from the effect of the discharge in Bankruptcy and relies on such Act to save it and the decision is adverse to his contention that the decision is one adverse to a Federal right thus asserted.

Dimmock vs. Revere Copper Co., 117 U. S., 559, was a case where the bankrupt pleaded his discharge and the State Court denied the Federal Right thus asserted.

Long vs. Bullard, 117 U. S., 617, the writ of error is retained solely on the ground that appellant asserted that his discharge in bankruptcy relieved him and that the decision was adverse to the right set up.

McCormick vs. National Bank, 165 U. S., 538, overrules Strader vs. Baldwin, 9 How. 261 (which we did not cite); it did not mention or overrule Linton vs. Stanton, 12 How. 423 (cited by us) or Calcote vs. Stanton, 18 How. 243.

It points out that in Strader vs. Baldwin, 9 How. 261, the Court overlooked the fact that both parties set

up claims under the Bankrupt Act. That the plaintiff set up that he had the right to avoid the discharge under the rights given to him by the section saving fiduciary debts. The Court denied such right. The case in 165 U. S. 538 is the same thing.

The other cases cited, each and all, recognize that the appellant must be setting up a **Federal Right and that the decision** below must have denied the **Federal right**, not merely have decided against him.

The case of Linton vs. Stanton, 12 Howard 423, was one in which a defendant pleaded a discharge in bankruptcy. The plaintiff did not set up any right given him by the Bankrupt Act, but resisted the discharge as irregular. The Court sustained the plea of discharge. The plaintiff sued out a Writ of Error, and the case was dismissed by the Court because the case was not one of a decision adverse to a Federal Right set up by the Plaintiff in Error.

In the present case the defendant being sued on a partnership contract pleads that being discharged in Bankruptcy as shown by plaintiff's petition, the legal effect of the bankruptcy is to dissolve, by operation of law, the partnership of which defendant is a member, and that as a matter of general law, where a partnership is dissolved, for any cause, it terminates all executory contracts and ends liability for anticipatory breaches.

The plaintiff's contention **was not** that the Bankrupt Act excepted this contract from the effect which the discharge would otherwise have had, nor was the defendant's contention that the discharge relieved him from the lia-

bility existing thereon; but plaintiff contended that the liability claimed to have arisen by breaches of this executory contract after discharge was not affected thereby and defendant contended that as involuntary bankruptcy dissolved a partnership, **se invito**, the **Common Law** terminated the contract as a result of this event, and therefore, that there could not be anticipatory breaches or damages.

ALEX C. KING,
CHAS. T. HOPKINS,
Counsel for James R. Gray,
Defendant in Error.

SIMON LESSER,
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BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS THE WRIT OF ERROR.

The contentions made in the 1st and 2nd grounds have been considered and overruled by Palmer v. Hussey, 119 U. S. 96; Dimmock v. Revere Copper Co., 117 U. S. 559; and Long v. Bullard, 117 U. S. 617.

Three older cases appearing to support the contention of the movant: Strader v. Baldwin, 9 How. 261; Linton v. Stanton, 12 How. 423; Calcote v. Stanton, 18 How. 243, have been overruled by McCormick v. Market National Bank, 165 U. S. 538. See also: Winchester v. Heiskell, 119 U. S. 450; Rector v. City Bank etc. Co., 200 U. S. 405; Miller v. N. O. etc. Co., 211 U. S. 496; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300; Zavelo v. Reeves, 227 U. S. 625, 628.

The opinion of the Court of Appeals stated plainly that it was controlled by one question and stated plainly what that question was (14). Involving as that question did, the interpretation of a Federal statute, the Bankruptcy Act of 1908 and its amendments, it was manifestly a Federal question. The opinion also stated plainly that the

plaintiff in error contended for an interpretation of this Federal statute contrary to that enforced by the court (17). Obviously, by the overruling of his contention, a right, privilege and immunity claimed under Federal law was denied.

The recital of the proceedings in bankruptcy was necessary to a clear statement of the plaintiff's cause of action, particularly as to breach. But even if not so, the defendant's demurrer itself expressly raised a number of distinct Federal questions (11), all of which were decided by the Court of Appeals against the contentions of the plaintiff.

The non-Federal question raised by the second ground of the demurrer is destitute of merit, has never throughout the whole case been even referred to by court or counsel, and is not now claimed to be meritorious, or to have controlled, or to be broad enough to sustain the judgment of the Court of Appeals.

The third ground of the motion assumes that if this court upholds the contentions of the plaintiff in error, it will reverse on these special grounds only. This is an error, for if this court is convinced that the decision of the lower court was controlled by its interpretation of Federal law, and that there was no non-Federal ground broad enough to sustain the judgment, it will reverse generally. Judicial Code of the United States, §237.

Respectfully submitted,

HENRY A. ALEXANDER,

For Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1914

No. 110

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v.

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Defendant in Error

WRIT OF ERROR

to the

COURT OF APPEALS OF GEORGIA

Brief and Argument for Plaintiff in Error

HENRY A. ALEXANDER,
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STATEMENT OF THE CASE.

(Figures in parenthesis refer to pages of the printed transcript of the record.)

On July 23, 1907, Simon Lesser of Augusta, Ga., entered into a written contract with Inman & Company, a partnership, to supply them with not less than 500 nor more than 700 bales of "patches," a material for bagging cotton, during the season beginning September 1, 1907, and ending September 1, 1908. On May 4, 1908, after 176 bales had been delivered and paid for, an involuntary petition in bankruptcy was filed against Inman & Company in the District Court of the Northern District of Georgia. On May 25th and July 1st, following, the partnership and its members, including James R. Gray, were adjudicated bankrupts. Thereafter no demand was made upon Lesser for further deliveries, and no tender made by him. In July and September, 1908, discharges in bankruptcy were granted the partnership and each of its members from all their provable debts which existed on May 4, 1908, the date of the filing of the petition. In February, 1909, the price of patches having declined, Lesser filed proof of his claim in bankruptcy, claiming damages measured by the difference between the contract price of the undelivered 326 bales and their highest market price between the adjudication in bankruptcy and September 1, 1908. The trusteee objected to the claim upon the ground that it was not provable in bankruptcy in that no breach had occurred at the date of the filing of the petition; that the claim was not due and owing at the date of the adjudication; that it was not a fixed liability absolutely owing at the time of the filing of the petition, or at the date of

the bankruptcy or adjudication, and that it was not an existing demand at such time. (7, 8). They further alleged that Lesser's contract had not been avoided by the adjudication. (7).

A statement of the facts was agreed upon for the trial before the referee. (8, 9). After a hearing, he entered an order disallowing the claim and holding it not provable. (4). The question having been certified to Judge Newman, he, on January 1, 1910, rendered a decision holding that where involuntary proceedings in bankruptcy were instituted, it did not constitute such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damage claimed to have been caused by the failure to carry out the contract, and entered a judgment approving the order of the referee. (10). In re Inman & Co., 175 Fed. 312. There was no appeal from this judgment.

On March 16, 1910, Lesser, taking the position that inasmuch as his claim was not provable in bankruptcy, it was not dischargeable, and that the discharge in bankruptcy was, therefore, not available against him, filed suit against Inman & Company in the City Court of Atlanta upon the claim, asking judgment in the principal sum of $1,519.57, the difference between the contract price and the highest market value of the merchandise that had not been taken by Inman & Company. (2). James R. Gray, the only defendant of whom jurisdiction was obtained, filed a general demurrer (11) which, on June 8, 1910, was sustained. A judgment was entered dismissing the suit. (12).

On January 24, 1911, a judgment was entered by the Court of Appeals, to which a writ of error had been taken, affirming the judgment of the City Court (Lesser v. Gray, 8 Ga. App. 605), and on January 11, 1913, a writ of error was issued to the Court of Appeals bringing the case to this court. (18).

SPECIFICATION OF ERROR.

The error asserted and intended to be relied upon is the judgment of the Court of Appeals of January 24, 1911, affirming the judgment of the City Court of Atlanta of June 8, 1910, sustaining the demurrer and dismissing the case as to the defendant, James R. Gray.

BRIEF AND ARGUMENT.

The seven grounds of the demurrer will be taken up and discussed seriatim.

1. **"Said petition sets forth no cause of action against this defendant, nor does it set forth any facts which give the plaintiff any legal rights of any kind or character against this defendant."**

The first general ground is covered by the discussion of the other grounds.

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2. **"Because there is a non-joinder of parties-defendant, said petition disclosing that James F. McGowan was a member of said firm, and because his personal representative has not been made a party to said suit."**

This ground of the demurrer raises a non-Federal question. It was, however, not even referred to in the brief or argument of counsel nor in the decision of the lower court, and was not considered seriously by either, the judgment of the lower court having been placed expressly upon its interpretation of Federal law. In order, however, that this court may see for itself that the point could not, in any view, have controlled the decision of the lower court, its total lack of merit will be here shown. The contention is in sharp conflict with the settled law of the State. In the case of Roosvelt v. McDowell, 1 Ga. 499, decided in 1846, the Supreme Court held

that it was the rule at common law that the executor of a deceased partner could not be sued at law for a copartnership debt, but that the surviving copartner was alone liable to be sued therefor. Ross v. Everett, 12 Ga. 30; Sheffield v. Kay, 14 Ga. 537, 30 Cyc. 643. The Court further ruled that the Act of 1818 (embodied in §5596 of the present Code of Georgia of 1910) permitting the joinder of the representatives of a deceased partner, being in derogation of common law, must receive a strict construction and was not intended to embrace the contract of partners where the partnership name alone was signed to the instrument. In that case, a contract was signed with the copartnership name of "Walker & Leak." The doctrine of this case has never been qualified in any way. In 1858, an act was passed, now embodied in §5597 of the Code of 1910, expressly extending the terms of the act of 1818 to copartners, but not changing in any respect the ruling of the Supreme Court that the act of 1818 did not apply where the obligation was signed in the copartnership name, and not with the names of the individual members.

Furthermore, a conclusive reply to this contention of the defendant in error is the fact that the act of 1818 was, by its express terms, permissive and not mandatory, and did not alter the rule of common law, but merely extended a privilege to the plaintiff which he was at liberty to avail himself of or not as he might see fit. §§5596-97 of the Code, referred to, are as follows:

"§5596. **Representative of obligor may be sued, etc.** Where any person shall be in possession (in his own right, or in any other capacity) of any note, bill, bond, or other obligation in writing, signed by two or more persons, and one or more of the persons whose names are so signed as aforesaid shall die before the payment of the money, or the compliance with the conditions of said bond or obligation in writing, the person holding such bill, bond,

note, or other obligation in writing shall not be compelled to sue the survivors alone, but may at his discretion sue the survivor or survivors, or the representatives of such deceased person or persons, or survivor or survivors, in the same action with the representative or representatives of such deceased person or persons; provided, nothing herein contained shall authorize the bringing of an action of any kind whatever against the representative or representatives of any estate or estates, until twelve months after the probate of the will, or the granting of letters of administration on such estate or estates."

§5597. **Includes copartners.** The preceding section shall be so construed as to embrace debts against copartners, as well as against joint and several contractors."

Besides, it is the unquestioned law of Georgia, as elsewhere, that the liability of partners is several as well as joint.

Weatherly v. Hardman, 68 Ga. 592.
Reid v. Wilson, 109 Ga. 424.

Code 1910, §3156, which reads as follows:

"**Extent of partnership.** As among partners, the extent of the partnership is determined by the contract and their several interests. As to third persons, all are liable, not only to the extent of their interest in the partnership property, but also to the whole extent of their separate property."

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3. **"Because said petition discloses upon its face that in July and September, 1908, a formal judgment of discharge was duly entered in the bankruptcy proceedings by the District Court for the Northern District of Georgia, and that said discharge acquits this defendant of any right or claim in favor of the plaintiff, and particularly of the claim asserted in the foregoing suit."**

The third ground was without merit. The petition showed that the plaintiff's claim had been adjudged by the bankruptcy court, to which it had been presented for proof, to be not provable, and a discharge in bankruptcy operates to relieve the bankrupt from his provable debts only.

Bankruptcy Act, Sec. 1, Sub-Sec. 12, and Sec. 17.
Riggin v. Magwire, 15 Wall. (82 U. S.) 549.
Crawford v. Burke, 195 U. S. 176, at 186.
Tindle v. Birkett, 205 U. S. 183.
Grant Shoe Co. v. Laird, 212 U. S. 445, at 448.
Zavelo v. Reeves, 227 U. S. 625, at 632.
Mooch v. Market Street Bank, 107 Fed. 897. (C. C. A. 3d Circuit.)
Hamilton v. McCroskey, 112 Ga. 651.
Graham v. Richerson, 115 Ga. 1002.
Williams & Co. v. U. S. Fidelity, etc. Co., 11 Ga. App. 635.
Haber-Blum-Bloch Hat Co. v. Friesleben, 5 Ga. App. 123.
Baker v. Hooks, 6 Ga. App. 121.
National Surety Co. v. Medlock, 2 Ga. App. 665.
Wright v. Gottschalk, (Tenn. Ch. App.) 43 L. R. A. 193, 48 S. W. 140.
Dight, Receiver v. Chapman, 44 Oregon 272, 65 L. R. A. 793, 75 Pac. 585.
Sayre v. Glenn, 87 Ala. 631, 6 So. 45.
Glenn, Trustee v. Howard, 65 Md. 61, 3 Atl. 895.
Deane v. Caldwell, 127 Mass. 242, 244.
Paddleford v. State, 57 Miss. 118, 121.
Haywood v. Shreve, 44 N. J. L. 94.
Manion v. Campbell, 10 Mo. App. 92.
Eberhardt v. Wood, 2 Tenn. Ch. 488.
Collier on Bankruptcy, 9th Ed., page 384.
Remington on Bankruptcy, §628.

It is submitted that the truth of this proposition is inherent in the very nature and purpose of the bankruptcy law, which is the distribution of the insolvent's estate among his creditors on equal terms, and after and because of such distribution, his release from further liability to them, the design being evidently to give him an opportunity to rebuild his fortunes free from the burden and harassment of his old debts. As to claims of creditors, it is evidently the theory of the law that if these claims are allowed participation in the estate, and receive their equal proportionate share, the creditor should be satisfied, the bankrupt having done all in his power for the honest payment of his debts. But it is equally evident that this participation by the creditor in the bankrupt's estate is an essential prerequisite to the discharge of his debt, for it would be repugnant to every instinct of justice that a creditor should be denied the right to participate in the distribution of the estate, and be also denied the right to sue elsewhere. It would be doubly strange if the very fact of the denial to him of participation in the bankruptcy court should be the basis of an objection to a suit in the general court. And yet this is exactly the contention of the defendant in error. His position is simply this: "Because I have succeeded in preventing you from sharing with my other creditors in my insolvent estate, you should not be allowed to sue me in the state court."

The manifest purpose of the bankruptcy act contradicts such a contention. Under the classification of the act, claims are either provable or not provable. If they are provable, then, with certain express exceptions, not affecting this case, they are dischargeable. If they are not provable, they are not dischargeable. This is the inevitable conclusion from the plain language of the act, and the purpose which it seeks to accomplish. The language of section 17 is:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except, etc."

The unavoidable implication of this is that if debts are not provable they are not dischargeable. So manifest is this, that doubtless it never occurred to the draftsman of the act that there was any necessity of saying so expressly.

It may be seriously questioned whether Congress has the constitutional power to enact a bankruptcy law which would grant discharges against debts which, because they had not matured at the date of the filing of the petition, were held to be not provable and denied participation in assets. The power of Congress over the subject of bankruptcies is derived exclusively from paragraph four of section eight of article one of the Constitution. The common understanding of the purpose of a bankruptcy law at the time of the adoption of the Constitution was the distribution of the assets of an insolvent among his creditors. This was the primary purpose. Discharge of the bankrupt was granted only by consent of four-fifths of the creditors. 2 Bl. Com. 483; Nelson v. Garland, 1 How. 265; Hanover National Bank v. Moyses, 186 U. S. 181. Discharge as a matter of right was a later development. It would be an inversion of the original understanding of the term "bankruptcies" to enact a law which would deny a creditor participation in the division of the assets and, at the same time, grant the bankrupt a discharge from the debt. Such an arrangement would be confiscation pure and simple, and so far from being authorized by the paragraph of the Constitution empowering Congress to establish uniform laws on the subject of bankruptcies, would run counter to the fifth amendment to the Constitution forbidding Congress to deprive any person of life, liberty or property without due process of law.

4. **"Because said petition shows that an adjudication in bankruptcy was had upon an involuntary petition filed against the firm of Inman & Company, and its members, which said petition was filed on May 4, 1908, the adjudication thereon being on May 25, 1908; and that after said adjudication, said firm and its executory contracts or purchase were dissolved and annulled by operation of law—said petition showing that the petition in bankruptcy was an involuntary proceeding, and said petition further disclosing that at the time of the filing of said petition for an adjudication in bankruptcy no breach of said alleged contract had occurred upon the part of said Inman & Company."**

This fourth ground of the demurrer is sustained by several decisions in the lower Federal courts holding that the adjudication in bankruptcy operates to cancel and destroy all executory contracts of the bankrupt. Among the cases to that effect are:

In re Jefferson, 93 Fed. 948.
Bray v. Cobb, 100 Fed. 270.
In re Hays, Foster & Ward Co., 117 Fed. 879.
Bailey v. Loeb, 2 Fed. Cas. 376.
Malcomson v. Wappoo Mills, 88 Fed. 680.

A study of these cases reveals no other basis for this ruling than the mere assertion of the court that the adjudication is an act of the law. Why an act of the law should have this effect is not stated. The reasoning ends abruptly with that assertion. There is no reference to any general principle from which the proposition may have been deduced. It is submitted that the ruling is purely arbitrary, and has no basis in reason or authority. It is irreconcilable with the well established rule that trustees in bankruptcy or receivers in equity have the option, if they deem it to the advantage of their estate, to adopt and carry out the executory contracts. United States Trust Co. v. Wabash Western Ry., 150 U. S. 287,

300; First National Bank v. Lassiter, 196 U. S. 115. This option is incompatible with the idea that adjudication in bankruptcy terminates and destroys the executory contracts of the bankrupt. The right of the trustee or receiver to adopt an executory contract implies inevitably that it is still in full force and effect. But if the adjudication has destroyed it, how can the trustee adopt it? If adjudication ends executory contracts, the rule must be mutual and must have this effect in all cases, not only when the execution of the contract is to the disadvantage, but also when to the advantage, of the estate. It certainly can not be contended that this destructive effect follows only when the contract is to the disadvantage of the estate. A rule should work both ways. To hold that the contract was dissolved when the estate would lose by it, but unaffected when the estate could gain, would be wholly arbitrary and contrary to the plainest principles of mutuality and equality.

Take the facts of the present case. Suppose the price of the merchandise sold by Lesser had gone up instead of down, and there had been a profit in the contract to the estate of fifteen hundred dollars. Is there any doubt that the trustees would have demanded of Lesser the fulfillment of the contract? And if he had refused, is there any doubt that the court would have compelled it? Suppose, under the circumstances, Lesser had attempted to plead that the contract was executory, that it had been vacated and annulled by the adjudication in bankruptcy and that he was therefore released from liability. Would the plea have been taken seriously? Take the case of an executory rental contract. Suppose a retail merchant had succeeded in securing a long lease on a desirable location at a rental, say, of $50,000, below the real value of the premises. Suppose he is adjudged bankrupt, with a term of ten years yet to run under the lease. If the trustee in bankruptcy should undertake to take posses-

sion of and sell, as part of the estate, the remainder of the lease, would the landlord be heard to object on the ground that the lease was an executory contract; that the adjudication in bankruptcy avoided all the bankrupt's executory contracts; and that, therefore, the lease was annulled and cancelled? Take the case of an executory contract of employment. Suppose a land company had succeeded in obtaining an advantageous contract with a construction company by which the latter was to erect for the former at a price of $100,000 a building whose real worth would be $150,000. The land company goes into bankruptcy and the trustee demands of the construction company that it fulfill its contract and proceed at once with the work. Would it be heard to object on the ground that its contract was executory; that the adjudication in bankruptcy had dissolved all executory contracts; and that, therefore, its obligations under the building contract were cancelled and annulled? Take another case of an executory contract of employment. Suppose an electrical manufacturing corporation had an advantageous contract with an electrical engineer, from which, on account of better offers from other sources, he desired to be released. If the manufacturing corporation was adjudged bankrupt and the receiver or trustee decided to carry on the business and retain the engineer, would he be heard to object on the ground that his contract was executory; that adjudication in bankruptcy terminates all executory contracts; and that, therefore, his obligations under the contract were terminated and dissolved? No court would hesitate for an instant to answer these questions in the negative. How, then, can it be contended that executory contracts are dissolved by adjudication?

There is no better reason for declaring that adjudication in bankruptcy dissolves the obligation of executory contracts than that any other legal proceeding does so.

If adjudication destroys these obligations, why does not the filing of an ordinary suit and the issuance of the process or other writ have the same effect? When A sues B to recover damages for the breach of an executory contract, why does not the filing of the suit dissolve the obligation of the contract and destroy the claim? It is as much an act of the law as adjudication. If, as declared by the Court of Appeals, an act of the law dissolves executory contracts, that result should certainly follow. It would be no stranger than that worked out in the present case. Bankruptcy is simply a proceeding to distribute equally among his creditors the assets of an insolvent. There is nothing in the nature of the proceeding that should make it the means of destroying the rights of those whose contracts with the insolvent were executory. Its effect should be exactly the contrary, for the underlying intent of bankruptcy is preservation, not destruction. No reason whatever appears why it should operate to confiscate and destroy the claim of one creditor for the benefit of the others, merely because executory.

The qualification of the doctrine that adjudication in bankruptcy dissolves executory contracts to the effect that this result does not follow when the petition is voluntary does not render it any more reasonable. The distinction between voluntary and involuntary petitions is adventitious, and purely a matter of form, for many petitions involuntary in form are procured to be filed by the bankrupt, and, apart from form, no petition is really voluntary, and all are involuntary, for all are forced by circumstances upon the bankrupt against his will.

Besides, when was it ever suggested that the power of the trustee to adopt an executory contract of the bankrupt depended upon the form of the petition, and that if it were voluntary, he could, and, if it were involuntary, he could not adopt it?

Another indication that the Court of Appeals was in

error in concluding that executory contracts are avoided by adjudication is the fact that the bankruptcy act itself contains no language whatever supporting such a conclusion, either expressly or by implication. It is hardly conceivable that if the framers of the act had intended so momentous and far-reaching a result, they would not have said so in so many words. So important a consequence would not have been left to implication or judicial interpretation. As far as its language goes, the only part of the bankruptcy act which contemplates the relief of the bankrupt from his debts is the judgment of discharge. It seems strange that the adjudication should have been intended to have a like result and there be not the slightest word or suggestion to that effect. Looking to the language of the act. it would seem that there was only one means provided for relieving the bankrupt from his debts—that is, the judgment of discharge. It would appear, however, if the Court of Appeals and the courts taking the same view be correct, that all the while there have been two, and that the remedies of creditors could be destroyed not only by the discharge, but by adjudication as well, but with this important difference to the creditor: if his claim be destroyed by a discharge he is entitled to participate in the distribution of assets; but if by adjudication, it is completely extirpated and wiped out and no participation is allowed. Indeed, under this ruling, a bankrupt who, on account of his violation of the act, had been denied a discharge, might still be relieved of a large part of his debts through the destruction of his executory contracts by his adjudication. It is submitted that if the framers of the bankruptcy act had intended so vital a consequence they would have said so, and that there is no warrant whatever for the courts to import this meaning into its plain terms.

The gist of the Court of Appeals' decision was that the bankrupt partnership, Inman & Company, was dis-

solved by the adjudication in bankruptcy and that it followed, as an "inevitable corollary" that its executory contracts were "ended." The first proposition as to the dissolution of the firm is undoubtedly correct, but it is respectfully submitted that the second, that the dissolution of a partership ends its executory contracts, is in conflict with fundamental principles.

Another view of the matter to be considered is this: Both the language and the reasoning of the Court of Appeals in declaring that adjudication avoids executory contracts are broad enough to include, not only contracts, which, like that involved in the present case, are executory as to both the creditor and the bankrupt, but also those which are executory as to the bankrupt only. For, in the terminology of the law of contracts, the word "executory" is not confined to those unperformed by both parties. It applies as well to those unperformed by one party only. It simply designates that status of contractual obligation in which the act undertaken is yet to be performed. As to the reasoning on which this doctrine is rested, there is as much basis for saying that an act of the law avoids contracts executory as to one party, as for saying that it avoids contracts executory as to both.

Under this interpretation, it is evident that the doctrine that adjudication avoids executory contracts would include in its scope practically every class of debt that might be proved against a bankrupt's estate. For the class of debts enumerated by Section 63 of the bankrupt act as provable are all of them, with the possible unimportant exception of court costs, contracts which are executory as to the bankrupt. The practical result would be, therefore, that adjudication would instantly restore the bankrupt to solvency, obviate the necessity, or, indeed, the utility, of further proceedings, and send him

forth from court clothed with all his assets and wholly absolved from all his debts.

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5. **"Because said petition shows that said contract was not performed, and no offer or tender of performance was ever made by the plaintiff to said bankrupt firm, or to the receivers or trustees thereafter duly appointed for said firm."**

This fifth ground of the demurrer is without merit. Under the circumstances, no tender was necessary.

In re Swift, 112 Fed. 315.

Hills v. National Albany Exchange Bank, 105 U. S. 319.

U. S. v. Behan 110 U. S. 338.

Lovell v. St. Louis, etc. Ins. Co., 111 U. S. 264.

The case of In re Swift, supra, was practically identical in its facts with the instant case, and presented the question of the provability of a claim for damages for the breach of an executory contract for the sale of stocks. Discussing the question of tender, the court said:

> "We have, therefore, to deal with an agreement by which the bankrupts bound themselves to deliver certain stocks to Dee on payment of the balance from him to them, and by which also the bankrupts were entitled, on reasonable notice, to tender the stocks to their customers and claim like payment. But neither party fulfilled the ordinary conditions applicable to such relations. Neither made a demand or tender. Consequently, according to the ordinary rules of law, no cause of action arose in favor of either party against the other.
>
> The position is one, therefore, to be solved by the law itself. The case has no relation to any

question of the rights of either party, or the representative of either, including the trustee in bankruptcy, to make a demand and tender at any time, either prior or subsequent to a voluntary assignment or the beginning of proceedings in bankruptcy. * * * * * *

As we have already said, the solution of the proper relations of the parties in this case growing out of the assignment, or out of the filing of the petition in bankrupcty, is fixed by the law; and the simple rule, based on fundamental principles, and traceable in the text writers and decisions of the courts for fully a century, must be applied to the effect that, "**where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand for performance.**" Chit. Cont. (11th Am. Ed.) 1073. This rule was stated and applied in the reports as early as 1819, in Newcomb vs. Brackett, 16 Mass. 161, 166, where it was said that the defendant had conveyed to a stranger land which he had promised to convey to plaintiff, and that thus he had excused the plaintiff from making a tender, and entitled him to damages for breach of contract. It was also laid down in the broad language of Chitty on Contracts, in Lovell vs. Insurance Co., 111 U. S. 264, 274, 4 Sup. Ct. 390, 28 L. Ed. 423. Indeed, it is such an ancient rule, and so universally recognized, as to need no citation of authorities to justify its application in this case, where, as we have said, neither party has done any act ordinarily necessary to entitle him to enforce the contract, or recover damages for its breach, but each has left the mutual relations to be worked out by the law.

These propositions may be made somewhat clearer by comparing the position of a banker with that of stockbroker. A banker has not, ordinarily, on hand

sufficient funds to meet the check of all his depositors if they should all draw simultaneously, and he is not expected to do so. A like rule applies to stockbrokers. In the one case as well as in the other, so long as either remains solvent, he is presumed to be able to meet his contracts; and no action can be maintained against a banker by a depositor without first drawing a check or making some other proper demand, nor, in the case of a stockbroker, without a tender by his customer of the balance due him, and a demand of his stock. On the other hand, when either has made a voluntary assignment for the benefit of creditors, or gone into bankruptcy, or, perhaps, when he has committed other notorious act or insolvency, he has parted with the control of his assets, and the law assumes, as is the fact, that **his ability to perform his contracts has terminated, and that a demand and tender would be futile, and, ordinarily, an action may at once be brought.**''

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6. **''Because said petition shows that the plaintiff's cause of action was presented by him to the bankrupt court in said bankruptcy proceedings, and denied by said court in a final judgment, on January 1, 1910; and because said petition does not allege that said final judgment was ever reviewed, reversed or set aside—the matters and things connected with said claim being res adjudicata.''**

In this sixth ground of the demurrer, the statement that the plaintiff's cause of action was ''denied'' by the court in a final judgment misstates the facts. The merest reading of the decision of the court shows that it was not a ''denial'' of the claim. It was a judgment that there having been no breach of the contract at the date of the filing of the petition, it was, therefore, not provable. A decision on this ground that a claim is not provable is not the equivalent of a judgment ''denying'' the

claim. It means only that, the claim being immature, the bankruptcy court has no jurisdiction to deal with it, either to declare it valid or invalid. Such decision is analogous to the judgment of a court of general jurisdiction sustaining a plea in abatement based on the ground of the prematurity of the suit. The effect of such a judgment is to adjudicate, not the validity or invalidity of the cause of action, but to declare only that that particular court had then no power to pass upon it. This is a statement of an elementary and unquestioned principle of pleading. In 23 Cyc. 1151, it is said: "A judgment on a plea in abatement is not a final judgment on the merits in such sense that it will bar another action for the same cause," and on page 1231 of the same volume it is again stated: "A judgment rendered upon a plea in abatement is conclusive as to the matter of the plea—the jurisdiction of the court, the capacity of the parties, and the like; but not as to the merits of the action." Again, on page 1147 of the same volume, it is said: "The dismissal of a suit on the ground that it was prematurely brought, the cause of action not having yet accrued, is no bar to another action on the same demand after time has removed the objection." The same principle is embodied in §5679 of the Code of Georgia, as follows: "**Former judgment, when not a bar.** A former recovery on grounds purely technical, and where the merits were not and could not have been in question, will not be a bar to a subsequent action brought so as to avoid the objection fatal to the first. For the former judgment to be a bar, the merits of the case must have been adjudicated."

The trustee in bankruptcy objected to the proof of Lesser's claim when it was presented in bankruptcy upon the following ground, which is the equivalent of a plea in abatement on the ground of the prematurity of the suit, to-wit:

"That said proof of claim sets up an anticipatory breach of a continuing contract to buy future installments of goods, and as such is not a provable claim in bankruptcy. Said proof shows that at the date of adjudication, as well as the filing of the petition, no breach of said contract had occurred. It is not shown by said proof that at the date of adjudication or the filing of the petition that the vendee had refused to perform said contract, or that it had given notice of its declination not to carry out the said contract. And your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy, and, therefore, that the same is not a provable debt."

These objections were afterwards enlarged by the addition of the following amendment which emphasized and stated more definitely the plea of prematurity:

"That the amount claimed to be due in said proof of claim was not due and owing at the date of the bankruptcy, or at the date of the adjudication in said cause; that said claim was not a fixed liability absolutely owing at the time of the filing of the petition, or at the date of bankruptcy or adjudication; and that it was not an existing demand at such time."

So far from the trustees objecting to the claim on the ground that the contract had been avoided by the adjudication in bankruptcy, they explicitly contended that the exact contrary was true. The precise language of the objections on this point was:

"And your trustees show that the contract set forth is not such a contract as is avoided by an adjudication in bankruptcy and, therefore, that the same is not a provable debt." (7).

This question, therefore, whether the contract had or had not been avoided by the adjudication was manifestly not before the bankruptcy court. It had been wholly removed from the field of controversy by the explicit

statement of the trustees that the contract had not been avoided. Judge Newman had no such contention or issue before him and, therefore, even had he wished to, could not have effectually decided it. Reynolds v. Stockton, 140 U. S. 254, holding on page 270 that "in order to give a judgment, rendered even by a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings." There is nothing in the language used by Judge Newman which indicates that he attempted to decide such a contention.

Passing upon the issue actually before him, Judge Newman sustained the trustees' objections, the gist of his decision being: (10).

> "He (Lesser) relies upon an anticipatory breach of the contract caused by the bankruptcy proceedings. I do not believe that where involuntary proceedings in bankruptcy are instituted, and the bankrupt's business and effects are taken charge of by the court, and administered for the benefit of creditors, that it constitutes such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damage claimed to have been caused by the failure to carry out the contract, nor do I think that any of the cases cited go to this extent."

It is submitted that this is not a "denial" of the plaintiff's claim. It was a holding merely that it was not ripe for proof in the bankruptcy court, and that that court had no jurisdiction of it. The court did not undertake to pass upon the validity or invalidity of the claim. Indeed, having first decided that it had no jurisdiction of the claim by holding it not ripe for proof, it had no judicial power to go further and deal with the question of validity. Whatever might have been said on the question of validity would have been obiter dicta, and beyond the judicial authority of the court.

It was contended by the defendant in error in the court below that the mere citation by Judge Newman of the case of Inman & Co., 171 Fed. 185, was intended by him as an adjudication that Lesser's claim had been invalidated and destroyed by the proceedings in bankruptcy, and, therefore, that no appeal having been taken and the judgment standing unreversed, it was binding, whether erroneous or not, on the plaintiff in error, and was res adjudicata. If the premise of the defendant in error be correct, his conclusion is undoubtedly correct, but with this premise, to-wit: that Judge Newman intended by the mere citation of the case referred to, to adjudicate that Lesser's claim had been invalidated by the adjudication in bankruptcy, we take sharp issue, and assert that such a deduction from his opinion is totally unwarranted and in the teeth of his express language, which we reprint here:

> "He (Lesser) relies upon an anticipatory breach of the contract caused by the bankruptcy proceeding. I do not believe that where involuntary proceedings in bankruptcy are instituted, and the bankrupt's business and effects are taken charge of by the court, and administered for the benefit of creditors, that it constitutes such a breach of an executory contract as to authorize proof in bankruptcy for the amount of damage claimed to have been caused by the failure to carry out the contract, nor do I think that any of the cases cited, go to this extent."

In the first place, Judge Newman's intention in citing the case of Inman & Company, supra, is ambiguous because that case dealt with two questions: whether there had been a breach of the claimant's contract prior to the filing of the petition so as to render it provable, and, second, whether the adjudication in bankruptcy had avoided the contract. The first question was the only one certified by the referee, and, being, therefore, the only question before the court, the judgment can only

be construed as a response to the question certified. General Order in Bankruptcy, Number 27, Reynolds v. Stockton, 140 U. S. 254. The actual language of the referee's certificate showing the issue intended to be presented by him (171 Fed. 185), was as follows:

> "To the claim as amended the trustee filed a motion to expunge on the ground that the said claim is not a provable claim in bankruptcy; that the amount claimed to be due was not due and owing at the date of bankruptcy; that said claim was not a fixed liability absolutely owing at the time of the filing of the petition in bankruptcy in this cause; that it was an existing demand at such time, but both the existence and the amount of the possible future demands are contingent upon unforseen events; and that it is neither an unliquidated nor liquidated provable claim, nor was it an unliquidated or liquidated provable claim on the date of the bankruptcy."

The court, on page 186, states the question before it as follows:

> "It is conceded that if a breach of contract had occurred prior to the commencement of the bankruptcy proceedings, and the claim for damages on account of the breach already existed, that the amount of such damages might be liquidated in such manner as the court might direct; but the immediate question is whether, where there is a discontinuance of employment growing out of, and resulting from, the filing of a petition in bankruptcy, and that only, the right to damage exists and may be proved and the amount of such damage ascertained."

It is thus apparent that the citation of the Inman case is, to say the least, ambiguous, for it may have referred to the ruling on the first proposition as well as on the second. There is no reason to assert that it was intended as a restatement of one of them any more than of the other.

But, assuming that Judge Newman did intend by the citation referred to to adjudge that Lesser's contract had been avoided and cancelled by the adjudication in bankruptcy, it is clear that he had no power to do so. When a claim is presented to a bankruptcy court for allowance, the first question to be determined by the court is whether it has jurisdiction, or, in other words, whether the claim is provable. If that question be answered in the affirmative, then the court may proceed to pass upon the validity or invalidity of the claim. But, if the court concludes that the claim is not provable, it can go no further, because, by this judgment, it has decreed its own lack of power to proceed further. If it should attempt nevertheless to adjudicate the merits of the claim, the act would be beyond its judicial authority and its words would be merely obiter dicta and without judicial force. This limitation upon the power of the court is inherent in the very nature of judicial action and applies equally to all courts, including those of bankruptcy jurisdiction. Bryan v. Bernheimer, 181 U. S. 188, at 197. In that case, it was said: "In the opinion of Bardes v. First National Bank, 178 U. S. 524, it was indeed said: 'The powers conferred on the courts of bankruptcy by clause 3 of §2, and by §69, after the filing of a petition in bankruptcy' and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the favorable seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.' But the remark, 'can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant,' was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his

appointment." The decision in the Bardes case had been against the jurisdiction claimed. No court, however great its authority may be, can decree itself to be without power to decide the merits of a claim, and, in the same breath, render an effectual judgment on such merits. It is therefore clear that, even if Judge Newman intended, by citing the Inman case, to rule that Lesser's claim was invalid, he had no power to do so, because he had already held the claim to be not provable, and the ruling would have been obiter dicta and beyond his judicial authority. However, it is submitted that, as we have already shown, it was not Judge Newman's intention to rule that Lesser's contract had been avoided. His judgment was an entirely different one, towit: that his contract had not been broken at the date of the filing of the petition, and that, therefore, no claim or cause of action had then arisen thereon which was susceptible of proof. The effect of his decision was exactly what the plaintiff in error contends it to be—a judgment that the claim of Lesser had not come into existence at the date of the filing of the petition in bankruptcy and was therefore not provable.

The apprehension of the Court of Appeals that unless executory contracts are held to be avoided by adjudication in bankruptcy, they will survive against the bankrupt to harass him after his discharge is unfounded. If adjudication be treated as an anticipatory breach of such contracts, they will be provable, and being provable, the bankrupt will be discharged from them. It is believed that the only just and practical way to deal with the question of proving claims based upon executory contracts is to treat the adjudication in bankruptcy as, in practical effect it is, an anticipatory breach and allow the creditor to prove his damages according to the prin-

ciples established in the cases of Hochster v. De la Tour, 2 El. and Bl. 678, and Roehm v. Horst, 178 U. S. 1. These are old and established rules of procedure, the justice and expediency of which have been tested and approved by the actual experience of many years.

The following cases hold that bankruptcy is the equivalent of an anticipatory breach of an executory contract: In re Swift, 112 Fed. 315 (C. C. A. First Circuit; In re Pettingill, 137 Fed. 143 (D. C. Mass.); In re Neff, 157 Fed. 57 (C. C. A. Sixth Circuit, by Judge Lurton); In re Duquesne Incandescent Light Co., 176 Fed. 785 (D. C. Pa.); In re Dr. Voorhees Awning Hood Co., 187 Fed. 611.

See also: Lovell v. St. Louis Life Ins. Co., 111 U. S. 264; Carr v. Hamilton, 129 U. S. 669; In re D. Levy & Sons Co., 208 Fed. 479; In re Smith, 146 Fed. 923; Re Northern Counties of England Fire Insurance Co., 17 Ch. Div. 337, 341; Ex Parte Stapleton, 10 Ch. Div. 586, 590; and Benjamin on Sales (7th Am. Ed.) §759.

On the measure of damages: U. S. v. Behan, 110 U. S. 338, and Hinkley v. Pittsburg Steel Co., 121 U. S. 264.

The result worked out in the case of Watson v. Merrill, 136 Fed. 359 (C. C. A. Eighth Circuit) and like cases is an injustice to the bankrupt because, by establishing the claim to be not provable, it is left open to harass him after his discharge, which is thereby rendered practically nugatory. The leaning of the courts should be, as far as they are not plainly forbidden by the express terms of the law, to hold every claim provable, so that the protection afforded the bankrupt by his discharge will be real and not illusory and the beneficent purpose of the bankruptcy act effectuated. The argument of Watson v. Merrill and like cases that damages for the anticipatory breach of an executory contract are too contingent for proof is conclusively answered in Hochster v. De la Tour

and Roehm v. Horst, supra. There is also this peculiar feature in the conclusions reached in Watson v. Merrill. That case and indeed all like cases assume without discussion that if, prior to bankruptcy, there had been a renunciation or breach of the contract by the act of the bankrupt, the damages could have been estimated and proved. How, then when the breach results from adjudication, do the damages become too contingent to be estimated and proved? The character of the breach does not effect in any way the question of damages nor the the power of the court to anticipate the future and estimate what the damages will be, and if it can do so in the first instance, why not in the latter?

The result attained in the case of in Re Jefferson, 93 Fed. 948, and those following it, is unjust to the creditor, because, as we have endeavored to show, his claim, without any reason whatever or any default on his part, is entirely wiped out and destroyed.

The just and expedient course of procedure lies between the two. The adjudication in bankruptcy should be treated as an anticipatory breach, and the creditor be allowed to prove his damages according to the principles of Roehm v. Horst, supra. His claim thus being proved, the discharge would operate upon and end it and the bankrupt need fear nothing from it. Such procedure would be just to both creditor and bankrupt.

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7. "Because the petition shows that neither said firm nor any member thereof ever violated or breached said contract, and that any breach, or failure to comply with the contract, was due to the adjudication in bankruptcy proceedings; and that said contract, and any liability thereon, was dissolved, and discharged by operation of law; and that injury arising therefrom to the plaintiff was, in law damnum abseque injuria."

This seventh ground of the demurrer is a repetition in different language of the positions taken in the preceding grounds which have already been discussed.

It is respectfully submitted that the Court of Appeals erred and that its judgment should be reversed.

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